United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

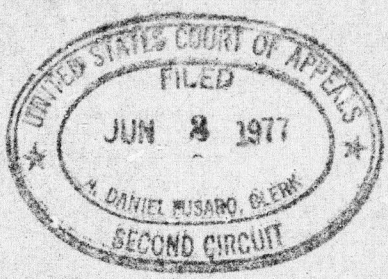
77-7142

To be argued by
JONATHAN W. LUBELL

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT



ANTHONY HERBERT,

Plaintiff-Appellee,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE and CBS INC.,

Defendants-Appellants.

ON APPEAL, PURSUANT TO 28 U.S.C. § 1292(b), FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE ANTHONY HERBERT

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Varnish v. Best Medium Publishing Co., Inc., 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969).....24, 51

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Wolston v. Reader's Digest, 2 Med. L. Rep. 1289 (D.D.C. 1977).....25

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IN THE

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ANTHONY HERBERT,

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-against-

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE and CBS INC.,

Defendant-Appellants.

BRIEF OF PLAINTIFF-APPELLEE ANTHONY HERBERT

This is the brief of plaintiff-appellee, Anthony Herbert ("Herbert"), in answer to the appeal of Barry Lando, Mike Wallace and CBS, Inc. ("CBS" or "CBS defendants") from the Memorandum Opinion and Order of Hon. Charles S. Haight, Jr., U.S.D.J. (JA 188a-230a).* In its opinion, the District Court concluded that nothing in the First Amendment required a narrow

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* References to "JA" are to the Joint Appendix filed with this Court.

and restricted application of the discovery rules so as to prevent inquiry into the relevant issue of the publisher's state of mind by the injured plaintiff confronted by the heavy burden of proof and requirement of actual malice established by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny (JA 195a-203a). On February 24, 1977, the District Court entered a second Memorandum and Order amending the earlier Order and including the statement set forth in 28 U.S.C. Sec. 1292(b) (1970). Thereafter, on March 17, 1977, this Court granted the petition of CBS for leave to appeal pursuant to Sec. 1292(b).

STATEMENT OF THE CASE

Nature of Case

Herbert, a Retired United States Army Lieutenant Colonel, brought this defamation action against the CBS defendants and Atlantic Monthly Company ("Atlantic")* for a broadcast entitled "The Selling of Colonel Herbert", presented by CBS on its 60 MINUTES Program ("Program") and produced by Wallace and Lando, and an article published by Atlantic and written by Lando.

(a) The Pleadings

The complaint alleged the following (JA 5a-47a):

Herbert enlisted in the U.S. Army at the age of 17 and rose through the ranks to become a Lt. Colonel. He spent 24

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* Atlantic is not a party to this appeal. References to it and the Lando article published by Atlantic are made herein only when necessary for clarity.

years in military service, and gained the highest professional reputation among his fellow soldiers and officers, as well as among the general public. He was the recipient of many awards and citations and during the 1950's toured much of the world on behalf of the United States Army. From September, 1968 to April, 1969 Herbert served with the 173rd Airborne Brigade in Viet Nam. On April 4, 1969, Herbert was relieved as Commander of the 2nd Battalion of the 173rd and given a bad efficiency report.

While in Viet Nam, Herbert reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. After his relief from command, Herbert attempted to process charges against his superior officers -- General John W. Barnes ("Barnes") and Colonel J. Ross Franklin ("Franklin") for failing to act upon his reports and complaints and for covering up the charged atrocities. After months without an indication of action, Herbert filed a formal complaint with the Inspector General's Office in Ft. McPherson, Georgia against Franklin and Barnes for failure to investigate and report war crimes. In March of 1971, Herbert brought formal charges against Franklin and Barnes at the U.S. Army Criminal Investigation Division (CID). Thereafter, these charges received extensive publicity on television and in the newspapers. The Army conducted an investigation resulting in the dismissal of Herbert's charges against Franklin and Barnes. Ultimately, the Army conceded that 7 of the 8 incidents which Herbert charged his superiors had covered up, did, in fact, occur in the 173rd area of operations.

"The Selling of Colonel Herbert" was broadcast on February 4, 1973. CBS presented the Program as a factual report of its investigation into the validity of Herbert's allegations. The Program falsely and maliciously depicted Herbert as a liar in his assertions that he had reported many atrocities to Col. Franklin or General Barnes, as a man capable of brutality to Vietnamese prisoners, and as a person who had used the war crimes charges as an excuse for his relief from command. As a result of the Program, Herbert's reputation was destroyed and he sustained severe financial loss.

The answers of the CBS defendants raised several affirmative defenses, including the First and Fourteenth Amendments to the United States Constitution.

(b) Discovery

CBS' description of its cooperation at the pre-trial discovery stage (DB 4)* is misleading. Some critical documents were not initially produced by CBS and only appeared during the course of depositions; certain interview notes have never been produced either because Lando purportedly could not locate them or because interview notes were allegedly not made; another document was first disclosed at the July 21, 1976, oral argument in the District Court (JA 148a-150a) and notes of specific CBS conferences at the Pentagon regarding the Program have never been produced.

During the course of depositions, the CBS defendants

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* References to "DB" are to the brief of defendant-appellants to this Court.

objected to certain of Herbert's Rule 34 requests and to certain questions asked. These questions, in the main, involve Lando's beliefs, opinions, intent and conclusions in the preparation and presentation of the Program. It is the District Court's ruling requiring CBS to answer these state of mind questions which is the subject of the present appeal.*

The District Court Opinion

The January 4, 1977, Opinion proceeds from the recognized premise that the First Amendment guarantee of freedom of speech does not constitutionally protect the knowingly false statement or the false statement made with reckless disregard of the truth (JA 195a). This latter species of unprotected false statements, the Court noted, is established by a "subjective awareness of probable falsity" or the "entertain[ment of] serious doubts as to the truth" of the publication** (JA 196a). After stating that whether or not defendants entertained serious doubts or had a subjective awareness

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* Contrary to CBS's view (DB 6, ftnote), rulings contained in the order of the District Court of July 21, 1976 were not included in the Certification Opinion. That Opinion expressly amended only the Order of January 4, 1977 (JA 239a). Further, on the issue of CBS' procedures we note that in Sullivan itself the Supreme Court considered as relevant the relationship between the specific procedures followed by the publisher and its general policy or standards for accepting advertisements (376 U.S. at 287).

** The District Court quoted the subjective tests enunciated in St. Amant v. Thompson, 390 U.S. 727, 731, 732 (1968); Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974); Garrison v. Louisiana, 379 U.S. 64, 74 (1964); and Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967) (JA 196a).

of probable falsity, "are questions of crucial relevance,"* the District Court defined the issue before it:

> The question is how a plaintiff in Herbert's position proves such elements as doubt or awareness in the minds of the defendants -- or, to be more precise within the context of the present motion, what discovery procedures he may legitimately summon to his aid.

(JA 196a-197a)

The Court reviewed the one previous decision that had focused upon the appropriate boundaries of discovery in a "public figure" defamation case (JA 197a-198a). There, Judge Levet had declared:

> Although in recent years the Supreme Court has placed stringent burden of proof requirements on a public official or public figure suing for defamation, such plaintiffs may still recover if they sustain their heavy burdens. As long as a cause of action for defamation passes constitutional muster, a plaintiff must be allowed reasonable opportunity for discovery.

Buckley v. Vidal, 50 F.R.D. 271, 273-274 (S.D.N.Y. 1970).

After noting that "one cannot close one's eyes to the possibility of malicious publications or statements concerning public figures," the District Court found that nothing in the First Amendment requires that the malicious publisher be permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules,

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* At the oral argument on July 21, 1976, Mr. Eldridge, counsel for CBS and Wallace, stated that "the definition of reckless disregard...makes the test a subjective test in terms of the state of mind of the defendant...." (JA 155a; see also JA 174a).

resulting in the denial to plaintiff of discovery into areas which lie solely with defendant. Otherwise, the Court concluded, "the law in effect provides an arras behind which malicious publication may go undetected and unpunished"(JA 199a).*

The Court proceeded to consider whether the areas of dispute relating to "Lando's conclusions, opinions and intentions, formulated during the period of time that he was researching and preparing the television program," were relevant. The Court found:

> Where, as here, the defendant's state of mind is of central importance to a proper resolution of the merits, it is obvious that these lines of inquiry may lead, directly or indirectly, to admissible evidence.

(JA 201a)

And further:

> The publisher's opinions and conclusions with respect to veracity, reliability, and the preference of one source of information over another are clearly relevant...
> The lines of inquiry under discussion are entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another.

(JA 201a-202a)

* CBS errs in its description of the District Court's citation of Judge Lumbard's concurrence in United States v. Matles, 247 F.2d 378, 383 (2d Cir. 1957), rev'd on other grounds, 356 U.S. 256 (1958). (DB 6) The Court's discussion of Matles (and Rule 26(b)(1)) was not illustrative of any alleged lack of concern for First Amendment considerations but was expressly directed at an argument presented by defendants in the District Court, "that many of the areas into which Herbert wishes to inquire would not constitute admissible evidence" (JA 199a-200a).

The District Court quoted (JA 201a) from this Court's decision in Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970),* including the following:

> Moreover, the Court properly instructed the jurors that they should consider all the evidence concerning appellants' acts and conduct in publishing Fact in deliberating upon whether the defendants published with actual malice. There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. See, e.g. Curtis Publishing Co. v. Butts, supra. (emphasis added by District Court) **

In its subsequent opinion of February 22, 1977, the District Court described "the context of considerations that arise out of New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny" in which its prior determination was made:

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* The District Court also cited Time, Inc. v. Hill, 385 U.S. 374, 391-394 (1967).

** CBS' description of the District Court's view of cases it cited (DB 7) is discussed below along with a consideration of those cases. See pages 27-29 infra.

> Those considerations include: the scope of protection given by the First Amendment to publishers or other media who direct their attentions to "public figures"; the bases upon which such figures may hold publishers and media liable for defamation, notwithstanding that First Amendment protection; and the proper function of pretrial discovery procedures having in mind the plaintiff's bases of liability, the burden of proof he bears, and the defendant's First Amendment rights.*
>
> (JA 232a)

Statement of Facts**

The disputed questions arose within the context of extensive information obtained at discovery concerning the purpose of the Program and the disregard and distortion of materials contradicting statements presented on the Program.

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* One final matter should be noted regarding the District Court opinion. Before that Court, CBS urged that the First Amendment barred all inquiry into the state of mind of the publisher in researching and preparing the publication. No qualified protection was claimed; no guidelines for weighing First Amendment concerns against the relevancy and importance of the questions were proposed. The Court correctly described CBS' position as "a broad-scale objection...that inquiry into opinions, conclusions, the basis of conclusions, and intent cannot be permitted...." (JA 200a) We maintain that the District Court opinion remains vital and correct whether reviewed against CBS' position below or against the arguments it now urges upon this Court. In addition, the order directing CBS to answer the disputed questions is proper under the particular circumstances of this case even if a qualification were imposed on questions concerning the state of mind of the publisher in preparing and presenting the publication. See pages 45-49 infra.

** Numbers within parentheses refer to pages of the Lando deposition; numbers preced by "W" refer to pages of the Wallace deposition; numbers preceded by "Ex." refer to exhibits marked at the Lando deposition and numbers preceded by "p." refer to the page of the particular exhibit. Numbers preceded by, or exhibits containing "A" refer to pages of the deposition of Col. Reed or the exhibits marked at that deposition.

A review of some of this information,* which was similarly before the District Court, demonstrates that the disputed areas of inquiry concerning CBS' state of mind during the researching and preparing of the Program are directly relevant to the particular matters testified to at the depositions or disclosed in documents produced by defendants and others.

(a) The Purpose of the Program

While the Program described itself as a "report" of CBS' investigation into the validity of Herbert's allegations of American military cover-up of war crimes in Viet Nam (JA 50a), the broadcast was a deliberately selective presentation directed at creating but a single impression -- that Herbert was a liar, an opportunist and a brutal person. CBS became committed to this particular purpose and object of the Program prior to the commencement of substantial investigation.

On November 28, 1972, before Lando had conducted most of his interviews or developed his investigation, he told Colonel Leonard F. B. Reed, Jr. of the Pentagon's Information Office that his, Lando's, premise was that

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* The facts discussed below represent only a portion of the information disclosing a consistent pattern of disregard, distortion and omission which characterized the preparation for and presentation of the Program.

Herbert was a liar* and that there would be no story if Herbert's account could not be "debunked." Lando's statements were made in connection with his request to the Pentagon for information and interview support in preparing the Program (Exhibit I).** On December 4, 1972, at the time of his first interview with Franklin in the Pentagon and still prior to conducting most of his investigation, Lando repeated his interest in debunking Herbert and further told Col. Reed that Wallace "is equally convinced that the story is in debunking Herbert" and that the story "will not go unless he can convincingly portray Herbert as the bad guy" (Exhibit II). On December 20, 1972, Lando met with General Sidle of the Pentagon Information Office to discuss his research to date and to request support for the production of the Program. In this conversation Lando indicated to General Sidle that his "piece is aimed at debunking Herbert in his long fight against the Army" (Exhibit III).

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* When Lando initially discussed with Wallace a 60 MINUTES segment on Herbert, Wallace, having read some newspaper articles but without any investigation whatsoever, announced that he thought Herbert was lying (55-56; JA 71a).

** Lando's statements are described in three documents originally obtained with deletions from the Department of the Army after an administrative appeal under the Freedom of Information Act (FOIA). Herbert instituted an action in the District Court for the District of Columbia to obtain unexcised copies of these documents, as well as others. (Herbert v. Department of the Army, D. D.C., Civ. Action No. 77-0155). Copies of the complete documents have now been produced in that proceeding by the United States Attorney. They are annexed to this brief at pages 56 - 58 infra, and designated Exhibits I, II and III.

The predetermined and fixed objective of the Program uncovered in the FOIA proceeding has been steadfastly concealed from Herbert in this litigation. Lando's testimony is not only devoid of any reference to a fixed purpose for the Program but also contains representations that all he told the Pentagon officials was that CBS was trying to "shed more light on the Herbert case" (1705).* Lando produced notes of many conversations with Pentagon representatives, and, in particular, Col. Reed, (see e.g.: Ex. 156-158, Ex. 160, Ex. 161), but he did not produce any notes of the November 28, 1972 meeting with Col. Reed, nor any notes relating to the particular conversations on December 4 and 20, 1972, described in the Department of the Army's memoranda (1774).**

(b) Disregard and Distortion of Materials Contradicting Statements Presented on the Program

The Program presented a portion of a filmed interview with Franklin made in the Pentagon on January 4, 1973, in which he stated that Herbert never discussed with him war crimes or atrocities (JA 52a). However, in a second filmed interview of Franklin by Lando, Franklin admitted that he frequently would "tune-out, turn-off" when Herbert was

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* Because of the instant appeal, no deposition of the CBS defendants has been held since Herbert received the complete Army documents as a result of the FOIA proceeding.

** Similarly, when Col. Reed was deposed prior to the FOIA production of the Army memoranda which he had prepared, he failed to produce the memoranda and did not testify to the conversations described therein.

talking and that it was certainly possible that Herbert could have made comments criticizing the ARVN (the South Vietnam Army) or American advisors about the mistreatment of the Vietnamese (Ex. 102, pp. 2, 8). No reference whatsoever was made on the Program to this second interview, notwithstanding that one of Herbert's specific charges was that he had reported to Col. Franklin the action of South Vietnamese forces, accompanied by an American Advisor, in shooting Vietnamese detainees at Cu Loi on February 14, 1969.*

While the Program contained a statement that none of the men serving under Herbert "were certain that he had actually reported" the February 14 killings (JA 54a), CBS had in its possession two sworn statements of Captain Jack Donovan, one of Herbert's staff officers, that he was certain Herbert had complained of the Cu Loi killings to Brigade Headquarters (Exs. 83 and 84). In the first statement, Donovan swore that he was certain that the report by Herbert of the killings was made to Franklin; in the second statement, given after Donovan was called back by the Army CID, he stated he could not be absolutely certain that it was Franklin to whom Herbert was talking but believed it to be him.** These statements by someone who was present at Brigade Headquarters while Herbert was complaining of the February 14 killings were utterly disregarded in the Program.

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* The second filmed interview was apparently not even disclosed to others at CBS -- Wallace testified that he had no recollection of having any knowledge prior to the institution of this action of that interview (W 89-90).

** In his second filmed interview, Franklin admitted he could not explain

The Program presented a filmed statement by General Barnes that "[Herbert] was a killer" (JA 51a) and a subsequent comment by Wallace that there are men who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself" (JA 58a). While Wallace also stated that several men say "it's not so" (JA 58a), the Program proceeded with statements from three soldiers solely intended to support the brutality picture of Herbert drawn by the broadcast (JA 59a 60a). In presenting these statements, CBS totally disregarded the fact that a number of people had told Lando that one of the soldiers (Plantz) could not be trusted and his story was not supported in any manner by anyone else (569, 570, 257, 371-372, 575, 583-584); that Lando had specifically noted the story of the second soldier (Stemmies) had to be checked as to whether Herbert had actually witnessed the beating, yet that soldier was never reached again though another soldier indicated Herbert could not have seen the beating (917, Ex. 13, p. 7); and that the third soldier's (B. Potter) statement was not corroborated by anyone.

On the other hand, all statements contradicting this picture of brutality, no matter how reliable or corroborated, were ignored.* The program omitted any references to:

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the Donovan statements (Ex. 102, p. 13). Lando did not show them to anyone else except Wallace.

* Consistent with the objective of portraying Herbert as a "bad guy" and a liar, a month prior to broadcast, Wallace, at the Pentagon and in front of one of its officers, stated to Lando that it would be ideal if CBS could obtain for the program statements saying that Herbert was capable of brutality. (Dept. of Army Ex. A-7; cf. W 25).

Cpt. Grimshaw's filmed statement that Herbert warned him never to have his command involved in any atrocities (Ex. 125, pp. 17, 19; Ex. 60, pp. 44-45);* pilot Larry Kahili's statement of Herbert's briefing of the helicopter pilots not to shoot Vietnamese but to take them prisoners (Ex. 21, p. 7; 204) and of Herbert's humane treatment of the Vietnamese population (Ex. 48, 875, 876); Sgt. Warden's statement that an angry Herbert had spoken to his entire Company condemning the February 14 killings (Ex. 144, 2094, 2095); Brigade Surgeon Lawrence Potter's sworn statement of Herbert's concern for good medical care for the Vietnamese (Ex. 51, p. 2; Ex. 50, pp. 484-486, 877-878); Battalion Surgeon Francis Tally's sworn statement as to Herbert's concern for the Vietnamese population (Ex. 52; Ex. 50, p. 483); Cpt. Christopher Dorney's sworn statement that he was constantly being reminded by Herbert to watch out for the safety of the civilian population (Ex. 53; Ex. 50, p. 491).

Implying that Herbert's charges had been refuted by Captain Bill Hill, a company commander under Herbert, the Program quoted Hill that Herbert has "become a liar. It's all so much garbage" (JA 60a). However, CBS disregarded everything Hill had told Lando concerning Herbert's reporting of war crimes. In March, 1972, in a telephone conversation, Hill

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* At his deposition Wallace admitted he had the impression before the broadcast that Herbert had warned men in his command against the commission of atrocities (W 148-149).

told Lando that he heard the radio transmission of Herbert reporting the Cu Loi killings to somebody higher up and it had to be either Franklin or Barnes (Ex. 4, p. 5). Lando spoke to Hill later in March and Hill reiterated that he heard Herbert on the radio reporting to a superior (L 249; Ex. 21, p. 32). After Lando's meetings with Col. Reed at the Pentagon (see pp. 10-11 supra) he then met with Hill and subsequently spoke to him three times on the telephone. Hill never changed his position that "As best as I know H[erbert] reported it" (Ex. 138, p. 2).

QUESTION PRESENTED

Whether the District Court erred in ruling that in this case the First Amendment did not require a constriction of the discovery rules so as to prevent inquiry into the relevant issue of the publisher's state of mind by the "public figure" libel plaintiff confronted by the heavy burden of proof and requirement of actual malice established by Sullivan and its progeny?

SUMMARY OF ARGUMENT

The District Court opinion resolved the claimed tension between Herbert's right to discovery and CBS' First Amendment claims within the principles of Sullivan and its progeny. Those principles permit civil libel suits by public figures for defamatory publications made with actual malice. Central to the "actual

malice" determination is the defendant's subjective state of mind. Herbert has sought discovery of matters which are directly relevant to this issue.

In urging that Herbert be denied discovery of these matters which, by their nature, are peculiarly within CBS' knowledge, CBS would prevent the libel plaintiff from attempting to meet the heavy burden of proof required to establish actual malice. Nothing in the First Amendment mandates such a result. On the contrary, the Supreme Court's recognition of liability for defamatory publication, and the subjective nature of the "actual" malice test, compel the conclusion that the particular discovery sought herein is fully congruent with the requirements of the First Amendment as set forth in Sullivan and its progeny. As a matter directly in issue in Sullivan libel cases, state of mind has been routinely inquired into both in pre-trial discovery and at trial. The treatment accorded such evidence in past cases reflects a general recognition that the inquiry sought herein is, as the District Court found, highly relevant, and not obtainable from other sources.

Cases involving governmental attempts to control what must be published or to prohibit something from being published are not applicable to a libel action seeking to assess the consequences of actual malice in a publication which has occurred. In the libel area, Sullivan and its progeny have

defined the scope of the First Amendment protections. Similarly, cases involving the functioning of government and the doctrine of executive privilege, as well as decisions considering government attempts to regulate, prohibit or restrict the exercise of constitutional rights are not in point. Since defamation actions premised on the actual malice standard are constitutionally permissible, discovery of relevant and material matters cannot realistically be said to have a "chilling effect" on the exercise of First Amendment rights. It is not Herbert's attempt to discover matters directly relevant to the central issue of CBS' state of mind that has worked the claimed chilling effect. Rather, the real target of CBS' chilling effect claim is Sullivan.

The journalist privilege cases similarly do not address the issue herein. Where the privilege has been asserted in non-libel cases, the reporter was not a party to the action and was not being asked to account for a publication outside of First Amendment protections. The privilege was asserted in response to a party's attempt to use the journalist's newsgathering activities as an information resource in aid of litigation, and not to prevent disclosure of relevant and material evidence in the possession or under the control of a party to the action. In both libel and non-libel cases, significantly different ramifications result from compelling disclosure of a journalist's confidential sources than from permitting questions regarding the

journalist's state of mind. In the former, there is a threatened adverse impact on the journalist's ability to gather news in the future regardless of whether he published with or without actual malice; in the latter, his news-gathering activities are unaffected and no significant impact on editorial activity or judgment is present.

Finally, the District Court's decision was not made in the abstract but was the result of a careful consideration of the lines of inquiries represented by the disputed questions, their relationship to the central issue of the defendants' subjective state of mind, and the unavailability of this information from other sources. The Court, thus, acted in full appreciation of the strictures of the First Amendment in public figure defamation cases and within those strictures, and, under the particular factual circumstances herein, rendered a decision which is fully in accord with the principles of Sullivan and its progeny.

POINT I

THE DISTRICT COURT'S OPINION PROPERLY DIRECTED DEFENDANTS TO ANSWER QUESTIONS PERTAINING TO THEIR SUBJECTIVE STATE OF MIND IN PREPARING AND PUBLISHING THE ALLEGEDLY DEFAMATORY BROADCAST

A. The Decision Below Properly Balanced the First Amendment Values Implicated by Defamation Actions with the Right of Plaintiff to Seek Redress for Injury to Reputation Under Sullivan Standards.

The District Court properly balanced the First Amendment values implicated in defamation actions with the right of plaintiffs to seek redress for injury to reputation.* Recognizing that in large measure the balance between those opposing considerations had been struck in Sullivan and the later decisions, the Court held that libel plaintiffs are entitled to develop the proof necessary to the elements of the action.

The Supreme Court in Sullivan, over the objection of Justices Black and Douglas (376 U.S. at 293), did not erect an absolute privilege to publish untrue statements about public officials or public figures.** While the Sullivan standard makes recovery more difficult by requiring a higher standard of scienter, it does not relieve the media defendant from exposure to suit. The Court struck a balance between the right to criticize and the right to be free of injury occasioned by defamation, in a manner which preserved

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* CBS asserted below an absolute privilege of "editorial judgment," apparently abandoned on this appeal, as a bar to inquiry into a publisher's conclusions, bases for conclusions, opinions and intentions by way of pre-trial discovery (see the footnote on page 9, supra). The trial court considered and rejected this "broad-scale objection"; its analysis then proceeded beyond CBS' specific claim of privilege.

** The Court was aware of the absolute immunity from suit that had been extended to public officials in Barr v. Mateo 360 U.S. 564 (1959), and of the rule of decisions like Tenney v. Brandhove, 341 U.S. 367 (1951), which bar inquiry into the motivation for official action. By contrast, the Supreme Court created only a qualified privilege for a libel defendant sued by a public official or public figure.

both values.

The District Court carefully considered the implications of the Sullivan privilege and the subjective test for the scienter standard of "reckless disregard." The discovery sought was held by the Court to be directly related to what plaintiff must prove in order ultimately to prevail -- defendants' state of mind at the time of publication (JA 201a).

Its view of the relevancy and materiality of the discovery in issue could not be clearer (JA 200a-203a, 235a). Moreover, the Court found that the information sought was unavailable from other sources, and refused to deny plaintiff "discovery into areas which in the nature of the case lie solely with the defendant" (JA 199a).

It is entirely unclear from the CBS brief where Judge Haight is supposed to have erred. The contention that the District Court ignored First Amendment considerations is misleading. The decision below is instinct with First Amendment values, and represents an original, scholarly effort at an understanding of the operation of the rules of discovery in Sullivan libel actions.

If CBS is asserting a qualified privilege, the decision below comports with the weight of authority which holds that a Sullivan libel plaintiff may obtain disclosure of confidential news sources.* The prerequisites ordinarily

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* See discussion at pages 39-44 infra.

identified for overcoming the privilege, and which CBS apparently endorses (DB 28) -- (1) relevancy, (2) materiality, and (3) unavailability of information from other non-media sources*-- are fully satisfied in this libel action (JA 199a-203a; 235a).**

B. As a Matter Directly in Issue Under the Test of Actual Malice, State of Mind Has Been Routinely Inquired into in Defamation Cases Both at the Discovery and Trial Stages.

Much of the rhetorical effect of the CBS brief draws on Judge Haight's characterization of the issue before him as one of "first impression" (JA 189a, 197a, 232a-233a). However, the paucity of decisional authority in this case stems not from the "exceptional" nature of the inquiry sought by plaintiff, as defendants intimate, but from the unavoidable judicial consideration of the publisher's state of mind in deciding Sullivan libel cases.

With the recognition that the "actual malice" predicate to liability enunciated in Sullivan requires proof of the publisher's subjective state of mind, courts and counsel alike have permitted the development of proof to conform to the elements of the defamation cause of action as defined by constitutional

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* See the discussion of James C. Goodale, Esq., Executive Vice President of The New York Times, and an author of the brief of amici curiae herein, in Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen, 26 Hastings L.J. 709, 738 (1975).

** The discovery sought herein follows a fortiori from the confidential source disclosure cases. See pages 43-45 infra.

stricture. In effect, a Sullivan libel case is treated in line with analogous branches of the law that require proof of intent, state of mind, fraud, etc. as elements of the particular action. "The state of a man's mind at a given time is as much a fact as is the state of his digestion." Swift v. Rounds, 19 R.I. 527, 531, 35 A. 45, 46 (1896).

In Goldwater v. Ginzburg, supra, 414 F.2d at 342, this Court stated that "[t]here is no doubt that evidence of... motive and of intent may be adduced for the purpose of establishirg, by cumulation and by appropriate inferences, the fact of a defendant's recklessness...." In Goldwater evidence was admitted and considered by this Court involving: (1) Ginzburg's stated intention in publishing the "Goldwater issue" of Fact Magazine, id. at 328; (2) Ginzburg's explanation and justification for the manner in which he labelled certain letters contained in the published articles, id. at 334-335; (3) Ginzburg's intention in making certain statements in the articles, id. at 334, n. 16; (4) Ginzburg's failure to determine whether his sole source on the "nervous breakdowns" charge had the information from personal knowledge, id. at 336; (5) Ginzburg's failure to even consider whether one response from a psychiatrist was true or false, id. at 337; (6) "a possible pre-conceived plan to attack Senator Goldwater regardless of the facts." Id. at 339-340.

In Curtis Publishing Co. v. Butts, supra, the Supreme Court treated as probative, evidence of the publisher's journalistic intentions:

> The Saturday Evening Post was anxious to change its image by substituting a policy of "sophisticated muckracking," and the pressure to produce a successful expose might have induced a stretching of standards.

388 U.S. at 158.

Similarly, in Varnish v. Best Medium Publishing Co., Inc., 405 F.2d 608, 611 n. 4 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969), this Court noted the explanation given by the publisher for quoting only a part of a suicide letter in the published article and added that if the entire letter had been printed the selling point of the article would have been lost. The Court also treated as evidence of recklessness the author's testimony concerning any basis he had for describing the suicide victim in the manner presented in the article. Id. at 612.*

And in Carson v. Allied News Company, 529 F.2d 206 (7th Cir. 1976), the Court found the evidence would support a jury verdict that defendants' publication was a "sheer fabrication," relying in large measure on deposition testimony by the author of the allegedly defamatory publication that the article he relied upon as his source provided "no basis"

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* See also Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976), cert. denied 45 U.S.L.W. 3489 (Jan. 17, 1977), where the Court considered Littell's testimony as to what he intended by a particular passage in the book concerning Buckley.

for his conclusion, and that he was unable to specify "what information, interference and/or implication" he drew from the source article in support of his assertions. Id. at 211-212.

Many reported cases indicate the discovery or disclosure of aspects of a publisher's state of mind at pre-trial without apparent objection by either party.* See, e.g., Carson v. Allied News Co., supra, 529 F.2d at 211-212 (reporter's deposition testimony on "basis" for certain statements in the article); McNair v. The Hearst Corporation, 494 F.2d 1309,1311, n.2 (9th Cir. 1974)(publisher's deposition testimony on the "impression" created by the article); Vandenburg v. Newsweek, Inc., 441 F.2d 378,380 (5th Cir.), cert.denied, 404 U.S. 864 (1971) (deposition testimony as to reporter's initial belief in plaintiff, subsequent disbelief and confirmation of his doubts); Wolston v. Reader's Digest, 2 Med.L.Rep. 1289, 1291-1293 (D.D.C. 1977) (defendant in deposition explained why he considered informant credible); Oliver v. Village Voice, Inc., 417 F.Supp. 235, 237-238 (S.D.N.Y. 1976) (inquiry at author's deposition into his assessment of credibility of third party statements, and whether particular events or conversation created any doubts in author's mind); MacNeil v. Columbia Broadcasting System, Inc., 66 F.R.D. 22, 25 (D.D.C. 1975)(producer's

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* As Judge Haight recognized, in the one case where a publisher objected to certain discovery in a defamation action on First Amendment grounds, the Court rejected the contention and stated "as long as a cause of action for defamation passes constitutional muster, a plaintiff must be allowed reasonable opportunity for discovery." Buckley v. Vidal, 50 F.R.D. 271, 274 (S.D.N.Y. 1970).

affidavit on summary judgment motion described his state of mind when he included in the broadcast certain excerpts from a lecture); F&J Enterprises, Inc., v. Columbia Broadcasting System, 373 F.Supp. 292, 298 (N.D. Ohio 1974) (affidavits by Wallace and a producer that they had no reason to doubt the truth of certain matters because of the reputation of the interviewee and that they did not bear any personal malice or ill will towards plaintiff); Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F.Supp. 421, 425 (D.D.C. 1972) (deposition testimony by editor of newspaper that he believed information told to him by a person at the CIA); Konigsberg v. Time, Inc. 312 F.Supp. 848, 854 (S.D.N.Y. 1970) (senior editor's affidavit recited bases on which he believed the story was true); Ragano v. Time, Inc., 302 F.Supp. 1005, 1008-1010 (M.D. Fla. 1969), aff'd, 427 F.2d. 219 (5th Cir. 1970), (deposition testimony of publisher's vice-president as to why known facts were deleted from a story); Cf. Peagler v. Phoenix Newspapers, 2 Med.L. Rptr. 1687, 1692 (Ariz. Sup. Ct. February 4, 1977) (deposition testimony by publisher that he did not know why he had not verified with the Better Business Bureau his assertion regarding the number of complaints on file against plaintiff company).*

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* Even in the case at bar, CBS has permitted a selective disclosure of its "editorial judgment," answering some questions and claiming immunity as to others. There is no discernible principle which distinguishes what was answered from what was shielded. Thus, Lando testified about the reasons that CBS decided not to film a particular interview for the Program (e.g., 125-126); whether he considered including comments about various

Far from a "wooden application of the discovery rules" (DB 21), the District Court weighed all appropriate First Amendment considerations and properly determined that Herbert was entitled, under Sullivan standards, to inquire into matters material, relevant and otherwise inaccessible on a central issue in the case.

POINT II

THE ARGUMENTS OF CBS ON APPEAL ARE NEITHER SOUND NOR PERSUASIVE

A. The Decision Below is Not in Conflict with Tornillo and Democratic National Committee.

CBS erroneously proposes that the rulings in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), immunize the "editorial process" from inquiry in all circumstances (DB 10-12). The protection applicable where the State has attempted to determine what the media must publish (or, as in prior restraint situations, what must not be published) does not define the protection to be afforded the editing process during the course of discovery in a libel action where plaintiff's claim is that,

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matters on the Program which were not included (e.g., 159, 302-304); whether he and Wallace discussed asking additional questions of persons interviewed to determine their freedom from pressure or bias (e.g., 1906); his state of mind regarding the Program's focus or intent (e.g., 281); his conclusions as to the existence or accuracy of facts which were not presented on the broadcast (e.g., 350-352, 1094, 1103-1105, 1756-1757, 1881-1887, 1892-1893); his conclusion as to whether the Program presented an objective report of particular statements (e.g., 1528, 1530); his view of the importance of having a particular reference on the Program (174).

because of defendants' actual malice, the truth failed to survive that process.

Tornillo was addressed to the issue of whether a state could compel a newspaper to print replies by candidates for public office who felt aggrieved by the paper's editorial comments on their candidacy. Democratic National Committee was addressed to the issue of whether the federal government could compel the broadcast media to accept paid editorial advertising. In determining the scope of permissible governmental interference with publishing decisions, the Court refused to hold that government could compel media publication of material it might not otherwise be obligated to publish. A publisher's freedom from prior restraint and from direct compulsion "to print that which it would not otherwise print," Tornillo, 418 U.S. at 256, however, does not absolve the publisher from liability for the consequences of publications where "editorial judgment" was exercised with knowledge of falsity or reckless disregard of the truth or falsity of what was published.*

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* In Tornillo, Justice Brennan, joined by Justice Rehnquist, concurring, made clear that the decision "addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction," 418 U.S. at 258. Mr. Justice White, concurring, noted that Tornillo does "not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form....The press certainly remains liable for knowing or reckless falsehoods under New York Times v. Sullivan ...." 418 U.S. at 262.

Similarly, in a recent book review in the Yale Law Journal, counsel for CBS on the present appeal found that cases involving the editorial process fall into three categories, each involving a different degree of First Amendment protection. Abrams, In Defense of Tornillo, Book Review, 86 Yale L.J. 361 (1976). While libel cases are in the second category, "Tornillo is located at the apex of the First Amendment hierarchy", where the State has attempted "to determine either what must not be printed (i.e., prior restraint) or what must be printed (i.e., access)." Id. at 367 and n. 47.

The District Court below, after finding that Tornillo and Democratic National Committee dealt "with statutes or regulations purporting to specify what newspapers or broadcasting stations must print or say," concluded that those "cases have nothing to do with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication" (JA 203-204a). While CBS has severly criticized this conclusion (DB 7), its soundness is derived from the recognition that media liability under Sullivan and its progeny has not been affected by Tornillo.*

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* On the same decision day as Tornillo, the Supreme Court announced its ruling in Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). There, Justice Powell, for the Court, stated:

> The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person.... [He] may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Similarly, a journalist's refusal to disclose to a Congressional committee the source of the "leak" of a document describing the conduct of the Central Intelligence Agency (DB 14-15, n.), presents an entirely distinguishable situation. Direct governmental interference with neutral and accurate news reporting about the conduct of government strikes at the core concern of the First Amendment -- the protection accorded to publications concerning the workings of government so that an informed public may maintain a vigilant check on the actions of its elected representatives. See New York Times Co. v. United States, 403 U.S. 713 (1971); New York Times Co. v. Sullivan, supra. The First Amendment values implicated in governmental efforts to censor public scrutiny of its workings presented in the Daniel Schorr case are simply not present in this private defamation action.*

B. Defendants' Comparison of the Decision Below with Direct Governmental Restraint is Misplaced.

The cases cited by CBS (DB 17, 18, 20) are, indeed, illustrative of the protections afforded by the First Amendment

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* There was, of course, no claim that publications concerning the Pike Committee report itself were unprotected. The House Standards of Conduct Committee was apparently concerned about the source of "leaks" of confidential information and called Schorr to disclose the identity of his source. By contrast, the Sullivan libel action provides redress for defamatory falsehoods, maliciously published which lie outside First Amendment protection. Moreover, CBS has assumed from the fact that the Committee declined to issue a contempt citation against Schorr that a citation for refusal to disclose confidential sources would not have been sustained by the courts. Cf. Branzburg v. Hayes, 408 U.S. 665 (1972).

against governmental regulation or restraint. However, Sullivan and its progeny have specifically defined the extent of that protection in civil libel actions brought by public figure plaintiffs.* References to decisions where prior restraints or official regulations have been invalidated are simply not apposite to a case governed by the rule fashioned in Sullivan, that the First Amendment has not removed from the media the threat of litigation entirely, but rather has confined the grounds upon which liability may attach.

The distinction between defamation actions and government attempts to control or regulate the press is expressly drawn in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 49 L.Ed 2d 683 (1976).** Chief Justice Burger, writing for the Court, analyzed the long history of First Amendment protections against prior restraints and the very different questions posed by post-publication inquiries into the content of what was published:

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* While the critical reason for the nonapplicability of the cited cases is Sullivan and its progeny, we note that the cited cases involve direct government control akin to a prior restraint on First Amendment protected activity, which is clearly distinguishable from a post-publication action for damages sustained as a result of a defamatory publication.

** CBS quotes from Nebraska Press Ass'n v. Stuart, the statement of Justice Brennan that "the decision of what, when, and how to publish is for editors, not judges." (DB 15) Omitted from CBS' brief is the critical qualification which immediately precedes the phrase quoted by CBS: "at least in the context of prior restraints on publication." 49 L.Ed 2d at 729.

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

(49 L.Ed 2d at 697; emphasis added).

Justice Brennan, concurring, drew this distinction in even sharper terms. Expressing his view that "there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained," he specifically noted the existence of other avenues whereby "shabby" reportage may be challenged:

> Of course, even if the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.

(49 L.Ed 2d at 714, n. 15; emphasis added).

As the opinions in Nebraska Press Assn. make clear, governmental interference with the decision to publish defeats the critical purpose of the First Amendment -- the

maintenance of a free marketplace of ideas as a prerequisite to a well-informed public. Nothing in that decision, or any other cited by CBS, suggests that the press is never accountable for false and defamatory publications,* nor that the process by which such publications are assembled is immune from discovery.

Since 1964 the media has beer well aware of the fact that it will be held liable to a defamed plaintiff who can meet the Sullivan test. All the District Court did was recognize that a plaintiff could seek discovery on matters relevant to that test. CBS' contention that such discovery will have a prohibited "chilling effect" on First Amendment rights simply does not follow when the area of inquiry -- subjective state of mind -- is a well established item of proof involved in public figure cases. CBS' real dispute is with the Sullivan rule itself. In arguing that discovery as to a recognized area of proof creates an unconstitutional chill, its actual target is the only possible source of any chill -- the Sullivan rule that media may be liable upon proof of reckless disregard in publishing a defamatory

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* The distinction between subsequent liability for published matter and the grave dangers inherent in "freewheeling pre-publication censorship" has been repeatedly recognized: "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975); Near v. Minnesota, 283 U.S. 697, 714-715 (1931).

falsehood.* Finally, CBS' attempt to draw upon cases regarding the "functioning of government itself" and exemption 5 of Freedom of Information Act, 5 U.S. C. §552(b)(5), is unavailing** (DB 16).

* Invocation of the term "chilling effect" cannot be employed as a talisman to secure to the media the absolute protection and privileges which may be accorded a Fourth Estate, but which are foreign to American jurisprudence. As Chief Judge Bazelon recently stated, in upholding the cross-ownership restrictions imposed by the Federal Communications Commission, "Freedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult." The question is not whether there is a burden on the media, "but rather whether there is something special about the burden that renders it unconstitutional." National Citizens Committee for Broadcasting v. FCC, Nos. 75-1064 et al. (D.C.Cir. March 1, 1977). See also Branzburg v. Hayes, 408 U.S. 665, 682, 683 (1972).

** The protection of executive session meetings of official bodies from the press was described in Branzburg v. Hayes, supra, 408 U.S. at 684, as a right existing "[d]espite the fact that newsgathering may be hampered...." Exemption 5 of the FOIA has its roots not in the First Amendment, but in the doctrine of executive privilege. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). Executive privilege itself will not immunize the government from discovery where questions of bad faith are involved or where there has been a prima facie showing of impropriety. Smith v. Schlesinger, 513 F.2d 462 (D.C.Cir. 1975); KFC National Management Corp. v. N.L.R.B., 497 F.2d 298, 305 (2d Cir. 1974), cert. denied, 423 U.S. 1087 (1976) (review of administrative decisionmaking process).

Furthermore, exemption 5 does not define the range of disclosure available to an aggrieved individual who is party to a substantive action. Rather, by its express terms, the exemption protects inter-agency or intra-agency materials "which would not be available by law to a party other than an agency in litigation with the agency...." While a general member of the public might be barred under the exemption from obtaining a particular document, a private litigant may be able to "override a privilege claim set up by the Government," depending "on the extent of the litigant's need in the context of the facts of his particular case; or on the nature of the case." N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 148 n. 6 (emphasis supplied).

See generally: 2 Weinstein's Evidence ¶ 509[07], at 509-49 and cases collected in n. 17 (1976).

CBS has turned to doctrines from other, distinct areas of the law to support its contention that provision of relevant discovery to a libel plaintiff chills the media's First Amendment rights. Sullivan, however, has defined a clear area of media liability for publications made with actual malice, and the cases cited by CBS expressly avoid intruding upon that area. Neither the public figure plaintiff seeking disclosure of facts relevant to an actual malice claim, nor the Court which is asked to rule upon this request, deprives the media of information, sources or the ability to fairly and accurately gather and present the news. The attempt to weld together inapposite authorities as a framework for this case must therefore fail.

C. The Decision Below is Consistent with Prior Cases Where Attempts to Further Burden the Sullivan Libel Plaintiff Have Been Rejected.

The District Court declined CBS' invitation to increase the weight of the Sullivan standards imposed upon public figure libel plaintiffs by drastically curtailing normal discovery rights (JA 199a). Judge Haight's analysis follows that employed by Judge McGowan in Carey v. Hume, 492 F.2d 631, 637 (D.C.Cir. 1974), pet. for cert. dismissed, 417 U.S. 938 (1974), holding that the "heavy burden of proof" in Sullivan required discovery of a media defendant's confidential sources. Moreover, the decision below was in accord

with other cases rejecting efforts to further constrict the ability of such plaintiffs to redress the injury caused by false and malicious publications.

In Curtis Publishing Co. v. Butts, supra, 388 U.S. at 160, the Supreme Court declined to hold that the First Amendment limited a jury's ability to assess punitive damages against a publisher. The Court noted, however, that "[t]o exempt a publisher, because of the nature of his calling from an imposition generally exacted from other members of the community, would be to extend a protection not required by the Constitutional guarantee." In Davis v. Schuchat, 510 F.2d 731, 734 (D.C.Cir. 1975) the D. C. Circuit rejected the argument that the First Amendment mandates a complete immunity from liability for statements made by a reporter to a limited number of people in the course of preparing a news story. In Stearn v. MacLean-Hunter Limited, 46 F.R.D. 76, 80-81 (S.D.N.Y. 1969), then District Judge Mansfield rejected defendant's contention that the Sullivan decision required a more stringent pleading of malice than called for by Rule 9(b), FRCP. Judge Edelstein ruled to the same effect in Arizona Biochemical Co. v. Hearst Corporation, 302 F. Supp. 412, 417 (S.D.N.Y. 1969). See also Guam Federation of Teachers v. Ysrael, 492 F.2d 438, 441 (9th Cir.), cert. denied, 419 U.S. 872 (1974) (holding

that while the standard of Sullivan must be utilized in examining evidence, the manner in which the evidence is examined "is the same as in all other cases in which it is claimed that a case should not go to the jury").

CBS relies upon Franchise Realty Interstate Corp. v. San Francisco Local Union Joint Executive Board, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 45 U.S.L.W. 3626 (U.S. March 21, 1977). Whatever the import of this unusual antitrust action, and we believe the Eighth Circuit was really attempting to reconcile conflicting substantive antitrust doctrines, the decision is not applicable to the defamation area where the courts have rejected attempts to impose more stringent pleading requirements. Judge Mansfield in Stearn refused to require a more specific allegation of malice, stating, in part, "a plaintiff will often be unable to pinpoint the factual basis for an assertion about a person's state of mind without further discovery," 46 F.R.D. at 79.* Similarly, in Arizona Biochemical Company, Judge Edelstein held, in a libel case governed by Sullivan, that "[n]o compelling reason" was shown for altering the usual rules of practice that pleadings are to contain short and concise statements, notwithstanding the claimed "chilling effect" of the threat of an expensive and prolonged litigation, 302 F. Supp. at 417.

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* Then District Judge Mansfield rejected defendants' "chilling effect" argument premised on the "fear of expense" of litigation, as inapplicable in the presence "of a requirement imposing upon a plaintiff the heavy burden of proving malice." 46 F.R.D. at 81.

Similarly, CBS' reference to a "rule" of granting summary judgment in libel cases (DB 19), misstates the law. In Goldwater v. Ginzburg, supra, 414 F.2d at 337-38 n. 21, this Court took the position that the usual principles governing summary judgment apply in libel cases. The decisions of several other circuits are to like effect.*

D. The Journalist Privilege Cases Do Not Support Defendants' Position on This Appeal.

Suggesting that the District Court failed to accomodate First Amendment interests by ordering the discovery requested herein, CBS relies upon cases involving a qualified privilege for the confidential sources of journalists (DB 23-28). Such reliance, however, fails to take account of the unique nature of that qualified protection, as well as the significant distinction which this and other courts have drawn between cases where accountability for the journalist's publication is at issue in the litigation, and cases where the fruits of those engaged in the newsgathering process are sought to be used for litigation against others.

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* See, e.g., Guam Federation of Teachers v. Ysrael, supra, 492 F.2d at 442 (finding applicable "the usual rule for determining whether a case should go to the jury"); Gordon v. Random House, Inc., 486 F.2d 1356, 1362 (3d Cir. 1973). Neither Guitar v. Westinghouse Electric Corp., 396 F. Supp. 1042 (S.D.N.Y. 1975), nor Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973), cited by CBS (DB 19), is to the contrary. In Guitar no material fact issue existed and summary judgment was appropriate under the usual rules; in Grant summary judgment was denied. Moreover, the dicta quoted from these cases (DB 19) fail entirely to address the contrary holding of this Court in Goldwater.

Compelled disclosure of confidential sources has been recognized as a serious infringement upon the newsgathering process, for it necessarily will dampen the willingness of third parties to communicate news to the media. In non-libel civil actions, the courts have been reluctant to order such infringement where the only countervailing interest is that of a litigant who wants to use the journalist's work product as an information resource; and have found such information to be not essential to the cause of action and obtainable from other sources. A libel action, however, involves a far different question. There, the injured plaintiff has been repeatedly held entitled to inquire into issues which may establish that the publication was defamatory.

The touchstone in this area is Garland v. Torre, 259 F.2d 545, 550 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958), holding that a journalist must reveal sources where the questions asked go "to the heart of the plaintiff's claim." While acknowledging that freedom of the press was "vital" to a free society, then Judge Potter Stewart found that this freedom was "not an absolute":

> basic too are courts of justice, armed with the power to discover the truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

(259 F.2d at 548).

In Carey v. Hume, supra, 492 F.2d at 635-636, Judge McGowan specifically addressed Garland's continuing validity in the post-Sullivan libel era, relying in large measure on the Supreme Court's reference with approval to Garland in Branzburg v. Hayes, supra, 408 U.S. at 686:

> In striking the constitutional balance contemplated in Garland, it could perhaps be argued that, although the Sullivan decision did not eliminate civil libel suits entirely, it has so downgraded their social importance that a plaintiff's interest in pressing such a claim can rarely, if ever, outweigh a newsman's interest in protecting his sources.... There is, however, the matter of the Court's continuing post-Sullivan citations of Garland. This strongly suggests the continuing vitality of the latter case, and negates any inference that the Court does not consider the interest of the defamed plaintiff an important one.

(492 F.2d at 635).

The need to strike a proper balance between the media's interest in protecting confidential sources and the citizen's general obligation to disclose the truth in a court of law has been repeatedly recognized.* In the non-libel area,

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* See, e.g., Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J. concurring). The concurring opinion in Carey v. Hume, supra, 492 F.2d at 640-641, persuasively described the countervailing values involved in this balancing process: "The news media must be free but it should also be responsible. To hold that it is responsible to the same extent as all other citizens are responsible for libelous publications, with the additional freedom recognized in New York Times, does not amount to an infringement on the constitutional guarantee of free speech and the freedom of the press. ...In my view the constitutional grant of 'freedom...of the press' does not convey an absolute immunity to publish libelous information that it receives and then protect itself and the source by exercising a privilege that prevents the victim from proving the malicious intent of the source or publisher" (emphasis added).

the claim of confidential source privilege has been given greater weight, in view of the additional concern, akin to the "work product" privilege, that the media not be harassed by persons looking for a "free ride" by compelling research support from journalists not involved in the particular dispute.

Baker v. F & F Investment, 470 F.2d 778, 783-784 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973), sets forth the legal analysis appropriate to cases where confidential sources are sought in the non-libel area. This Court clearly recognized that no absolute newsman's testimonial privilege exists, and held that the obligations of a reporter-defendant in a libel action to give relevant testimony must be distinguished from the obligation of a non-party reporter in a non-libel action to make "a wholesale disclosure" of confidential sources on matters of "doubtful relevance or materiality" to the action, where the plaintiff had made no effort to obtain the identity of the source by other means.*

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* Unlike the identity of a reporter's confidential sources which arguably may be ascertained by some means other than compelled disclosure by the journalist, a libel defendant's subjective state of mind cannot be directly ascertained by independent means. Lardo's reasons for ignoring some facts, disregarding others, and concealing still others are uniquely beyond independent determination by Herbert (See JA 199a).

The cases which have followed Baker adhere to this basic distinction. Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 81-82 (E.D.N.Y. 1975) is clear in its reaffirmance of the Garland rule. Apicella, of course, was not a libel action (DB 25), but rather a negligence action against a drug company where the non-party journalist was asked to disclose sources of a medical journal article. Judge Weinstein expressly noted that "[i]n a libel case, unlike other civil actions, the reporter or publication is a party to the suit. Moreover, the identity of the source may be crucial to the claim or defense."*

In Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973), the Court declined to uphold, on First Amendment grounds, broad subpoenas directed to ten reporters seeking the production of materials pertaining to the Watergate break-in and subsequent developments. At the outset, Judge Richey noted the same distinguishing factors which this Court recognized in Baker:

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* Some courts have held that there is neither an absolute nor a qualified privilege to withhold disclosure of confidential news sources. See Caldero v. Tribune Publishing Co., 2 Med. L. Rptr. 1490, 1495 (Idaho Sup. Ct. March 4, 1977); Dow Jones & Co. v. Superior Court, 303 N.E.2d 847 (Mass. 1973); State v. Buchanan, 436 P.2d 729 (Ore. 1968).

> Movants are not parties to the actions, but have merely been called to testify and produce documents at deposition. The parties on whose behalf the subpoenas were issued have not demonstrated that the testimony and materials sought go to the 'heart of [their] claim,' as was found to be true in the case of Garland v. Torre.

(356 F. Supp. at 1397).

The Court also noted that upon a future demonstration that the information sought could not be obtained from other sources, the qualified privilege may be lifted, 356 F. Supp. at 1398.*

The balancing of interests recognized by this and other courts with respect to confidential sources has not been extended to provide a libel defendant with any immunity from disclosure of editorial matters.** In Gilbert v. Allied Chemical Corp., 411 F. Supp. 505, 510, 511 (E.D. Va. 1976), Judge Merhige sustained a claim of qualified privilege

* The McCord decision repeatedly points out that it was presented with a sui generis case, that its holding was framed by "a constitutional issue of first magnitude" arising in the context of a challenge to "the very integrity of the judicial and executive branches of our government" and "strong allegations" of "corruption within the highest circles of government, and in a campaign for the Presidency itself," 356 F. Supp. at 1396, 1397. The particularly sensitive need for untrammelled newsgathering in the context of Watergate, however, cannot properly be read as surrounding the press on every occasion, including a libel litigation, with an impenetrable cloak of privilege. (Amici Br. 5-6) Plaintiff believes that the Court below was correct in determining that First Amendment concerns, as defined in Sullivan and its progeny, are not threatened by a finding that a libel plaintiff may discover of defendants matters which go to the heart of his claim.

** The determination that nonconfidential information pertaining to editorial matters are discoverable in Sullivan libel actions follows a fortiori from the rule requiring disclosure of confidential news sources in such actions. Discovery sought concerning the newsperson's state of mind is a much less intrusive interference with the investigative and reporting processes than confidential source disclosure, because it does not inhibit third parties from communicating potential news to the media.

respecting disclosure of journalists' sources in a personal injury action, specifically noting that such a privilege might have to endure abrogation in "meritorious libel actions."* However, the Court went on to reject a claim of privilege for editorial matters unrelated to confidential sources:

> There is in the Court's view, no basis in the First Amendment for a privilege relating to a reporter's or editorialist's slant on a news story or editorial. Only if material requested directly leads to the disclosure of confidences does the privilege attach.

The Court below did not have before it a claim of confidential source disclosure.** It did, however, engage

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* The Garland rule was not disturbed by the holding in Cervantes v. Time, Inc., 464 F.2d 986, 992 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), not to require source disclosure of a libel defendant where, on the motion for summary judgment, it appeared that defendants had established "without room for argument, facts that entitled [them] to judgment as a matter of law." The Court specifically recognized that obtaining source disclosure in a libel action was important to a libeled plaintiff, and recognized that the First Amendment did not grant to reporters a privilege to withhold their sources. The Court merely held that to grant disclosure of confidential sources without some indication that the libel action had merit would impair the newsgathering process. This limited holding is discussed in Carey v. Hume, supra, 492 F.2d at 637-638.

** Defendant Wallace had originally asserted a claim of journalist's privilege respecting certain Pentagon sources (JA 142a-147a). This claim was withdrawn, however, prior to the submission of briefs to the District Court on the disputed areas of discovery.

in the balancing of interests found appropriate by this Court in Baker for adjudging confidential source issues (JA 192a-204a; 232a-233a). By ruling that Herbert was entitled to the discovery, the Court acted in accordance with well-settled legal principles and with careful regard for the mandate of the First Amendment.*

POINT III

THE DISTRICT COURT OPINION WAS SOUNDLY BASED UPON THE FACTS OF THIS CASE

The District Court required that the questions must be "'relevant' to the subject matter of the action" (JA 200a). It proceeded to describe the areas of dispute into which the questions could be categorized,** and found that the lines

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* We would note that the asserted qualified privilege for "editorial judgment", which remains undefined, suffers from a spongey quality and threatens to eviscerate the effectiveness of all discovery in libel cases by subsuming the entire publishing process. What is a matter of "editorial judgment," and thus supposedly immune from all inquiry, is subject to creative elaboration, if not outright abuse. See, for example, the unsuccessful effort of Time, Inc. to interpose a First Amendment shield for a malicious publication by "substitut[ing] journalistic opinion in place of facts known by [the publisher] to be contrary to that opinion." Ragano v. Time, Inc., supra, 302 F. Supp. at 1007. Furthermore, the vagueness of any tests formulable by litigants or the courts and the inevitable uncertainty of application to similar, but not identical, cases, see Branzburg v. Hayes, supra, 408 U.S. at 702 and n.39, may well engulf the courts in protracted disputes over collateral issues.

** The Court noted that "the inquiries in question" appeared in an appendix to CBS' brief (JA 200a). The Court also had an affidavit setting forth the page and line reference of open questions (JA 180a-182a) and the full transcripts of all the depositions.

of inquiry may lead, directly or indirectly, to admissible evidence of CBS' "state of mind [which] is of central importance to a proper resolution of the merits...." (JA 200a, 201a).*

We turn first to the seven questions described by CBS as "illustrative questions" (DB 4-5). Five of these questions** bear directly upon the issue of whether CBS entertained serious doubts concerning the truth of materials presented on the Program which portrayed Herbert as a brutal man, insensitive to the atrocities committed against the Vietnamese. In the face of information available and known to CBS which unequivocally described Herbert as a

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* The Court commented that "usually the trier of the facts is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia" (JA 201a).

** The 5 questions were: whether Lando spoke to Wallace about including a comment on the Program that Plantz' statement regarding Herbert was not confirmed by any other soldiers (586); whether he ever concluded it was unnecessary to talk to Capt. Laurence Potter (666); what basis he had for his decision to interview Bruce Potter three times and Laurence Potter not at all (667); what basis he had for including Plantz' statement and not including Kahili's statement regarding Herbert's treatment of the Vietnamese (876); whether he proposed including any statement that some soldiers in the Brigade said Herbert showed care and consideration for the treatment of Vietnamese prisoners (877).

Lando did not answer many other inquiries concerning his conclusions, basis for conclusions and intentions on numerous materials bearing on the same subject of Herbert's treatment of the Vietnamese and his view of atrocities. (See e.g.: 668, L.8; 668, L.12 and L.16; 878, L.19; 1488, L.3; 1488, L.11; 1489, L.17; 1490, L.21; 1554, L.20; 1754, L.25; 1790, L.15; 1791, L.21.)

humane man concerned about the treatment of the Vietnamese population and outraged about atrocities, CBS seeks to foreclose inquiry into the state of Lando's mind when he disregarded all available materials in direct conflict with the Program's treatment of this subject.*

Lando similarly refused to answer questions as to his subjective state of mind in other areas where he included on the Program only statements adverse to Herbert and disregarded all contradicting materials. Thus, questions on Lando's state of mind with respect to the completely disregarded second filmed interview of Franklin, (see pages 12-13 supra), as well as on Franklin's veracity and credibility, were unanswered. (See e.g.: 1486, L.12; 1525, L.18; 1526, L.17; 1530, L.22; 2888, L.18-23; 2889, L.5-9; 2889, L.16-18) Also unanswered were questions concerning Lando's intentions in excluding from the Program any reference to the Donovan statements (see page 13

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* CBS erroneously implies that questions relating to Lando's state of mind on items that did not appear in the Program are not discoverable (DB 4). In Goldwater v. Ginzburg, supra, 414 F.2d at 336, this Court noted the following circumstantial evidence as part of the evidence from which a jury might have inferred actual malice: the covering letter mailed by defendant with the questionnaire but which he did not publish; a letter from the Medical Director of the American Psychiatric Association which defendant had read but did not publish; portions of articles which defendant did not include in the publication while quoting other contradictory parts of the article.

supra).* (See e.g.: 1138, L.18; 1139, L.2; 1139, L.10)

Other unanswered questions involve Lando's state of mind concerning Pentagon activities in reference to Herbert** or in assisting in the preparation for the Program, and Lando's conclusions as to the veracity of the Pentagon representatives. (See e.g.: 525, L.12; 1986, L.25; 1900, L.17; 1905, L.23; 2013, L.8 and L.21; 2014, L.8; 2453, L.5; 2454, L.8; 2891, L.6 and L.13) These inquiries were clearly relevant to the important issue of whether Lando entertained serious doubts as to the truthfulness of Pentagon sources and documents and the credibility of military personnel whom the Pentagon was willing to provide for interviews, including whether Lando was aware of possible bias and hostility of the Pentagon and intimidation and coercion of its personnel.***

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* In addition to the issue of reckless disregard for the truth, the Donovan statements are also evidence of Lando's knowledge of the falsity of material presented on the Program. Compare also the Program's statement that Franklin's check was "for the exact amount of the hotel bill" (JA 54a), with Lando's and Wallace's testimony that they knew that there remained a balance due on the Hawaiian hotel bill (1321-1323; W 71-74).

** The remaining 2 of the 7 "illustrative questions" noted by CBS (DB 4-5) relate to the impact upon source credibility of Pentagon representatives speaking against Herbert at Army bases (523, 524).

*** In Goldwater the evidence included Ginzburg's failure to determine whether the source of a particular charge had the information from personal knowledge and Ginzburg's failure to consider whether one response on the questionnaire was true or false, (414 F.2d at 336, 337). Here, the disputed inquiries concern Lando's consideration of the bias and coercion of his sources and his perceptions of the veracity and reliability of those sources.

In summary, the District Court had before it the disputed questions. It utilized CBS' description of the areas of inquiry into which those questions fell (JA 193a); it analyzed these lines of inquiry to ascertain whether they were relevant to the core issue of CBS' state of mind; it found the disputed areas to be within the sole knowledge of CBS (JA 199a); and it concluded that "Herbert is entitled to full discovery on these lines of inquiry" (JA 202a). Under these circumstances, CBS' characterization of the opinion as one where "the Court neither inquired 'into the substance' of plaintiff's libel allegations, nor required any 'concrete demonstration' of need for the material" (DB 28) is entirely unfounded.*

Having misinterpreted the Court's opinion in order to fashion its conclusion that the Court made no inquiry into the nature of or need for the discovery materials in question, CBS proceeds to misread the Court's statement regarding "reckless disregard for truth," as describing

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* In reference to CBS' position that this Court adopt the approach taken in Cervantes v. Time, Inc., supra, (DB 26), we note, as did Judge McGowan in Carey v. Hume, supra, 492 F.2d at 637, that there has been no motion by CBS for summary judgment in the instant case. Thus, the Cervantes situation is simply not present here. In any event, the substantiality of Herbert's case on the merits is evident from the record which was before Judge Haight. The record clearly contains evidence of "some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published...." Cervantes, 464 F.2d at 994 (emphasis supplied).

mere failures to investigate (DB 28-29; see JA 235a). When the Court stated that plaintiff was entitled to discovery of the selective aspects of the editorial process in order to be able to prove "whether there had been 'disregard' of available and accurate source material," it was referring to Herbert's ability to prove "reckless disregard" in CBS' decision to publish only selected aspects of material available and known to CBS.

In this Court's recent decision in Edwards v. National Audubon Society, Inc., Nos. 77-7018, 77-7034 (2d Cir. May 25, 1977), Chief Judge Kaufman noted that

> a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations. See Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

Slip Op. at 3770.

The present case does not involve neutral reporting; rather, it concerns a Program conceived by CBS as a personal attack on Herbert. Within this context CBS' subjective state of mind in including or excluding statements pursuant to this objective is highly relevant in determining whether CBS published with actual malice as defined in Sullivan, and

applied in Goldwater.* Rather than an "exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps" (Id.), the CBS Program was characterized by a predetermined conclusion, false statements, distortions of other statements, omission of materials from persons quoted on the Program and disregard of known materials directly contradicting statements presented on the Program.**

Moreover, CBS' further implication that investigatory failures may not form part of the evidence of reckless disregard (DB 29) is erroneous. Whether such failure will be treated as part of the proof of reckless disregard depends upon the availability to defendants and their knowledge of the source material and the presence of particular facts which would underline the need to further investigate or verify. Thus, in Curtis Publishing Co. v. Butts, supra, at 388 U.S. 157, within the context of a story which, as here, was not "hot news" and involved serious charges, the Supreme Court noted the following as probative failures of

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* Selective inclusion or exclusion as probative evidence of actual malice has been recognized in many cases. See, e.g.: Varnish v. Best Medium Publishing Co., Inc., supra, 405 F.2d at 611; Credit Bureau of Dalton, Inc. v. CBS News, 332 F. Supp. 1291, 1297 (N.D. Ga. 1971); Airlie Foundation, Inc. v. Evening Star Newspaper Co., Inc., supra, 337 F. Supp. at 426, 427; Ragano v. Time, Inc., supra, 302 F. Supp. at 1009; Speake v. Tofte, 327 F. Supp. 200, 201 (D.D.C. 1971); Rinaldi v. Holt Rinehart & Winston, N.Y.L.J., March 2, 1976, p. 5, col. 3 (Sup. Ct. N.Y. Co.) aff'd 52 A.D.2d 839 (1st Dept. 1976), appeal pending.

** Contrary to CBS' contention (DB 32), the instant case does involve the kind of "multiple abuses" condemned in Goldwater.

investigation: failure to obtain substantial independent support of the informant's statement; failure to view his notes; failure to interview an alleged witness to the informant's telephone call; failure to attempt to ascertain whether Alabama had changed its game plans or to screen the films of the games; failure to check the story with someone knowledgeable in football.*

See also: Blanke v. Time, Inc., 308 F. Supp. 378, 380 (E.D.La. 1970) ("The credibility of a claim that the publisher's failure to suspect falsity was in good faith and not reckless is a question of fact, which may depend on the circumstances surrounding publication, the reliability of sources, the opportunity available to investigate, and the urgency of publication, as well as the degree of sensationalism..."); Gordon v. Random House, Inc., 486 F.2d 1356, 1363 (3d Cir. 1973), vacated o.o.g. 419 U.S. 812 (1974) ("...Random relied upon Berson's representation ....Random, however, made no attempt at corroboration"; and

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* In concluding that the evidence established reckless disregard as required by Sullivan, C. J. Warren, concurring, referred to these "slipshod and sketchy investigatory techniques," at 388 U.S. 169. Although the Court in Butts differed over the phraseology of the standard for liability in suits by "public figure" plaintiffs, subsequent decisions make clear the distinctions at issue in Butts were of form rather than substance, and that Butts presented a case of "reckless disregard" within the Sullivan standards. See, e.g., Carey v. Hume, supra, 492 F.2d at 637, n. 10, 638,n. 12; Buckley v. Esquire, Inc., 344 F. Supp. 1133, 1135 (S.D.N.Y. 1972); cf. Hotchner v. Castillo-Puche, No. 76-7479, Slip Op. at 2525 (2d Cir. March 23, 1977).

there is a duty to investigate where the "hot news" factor is absent and where plaintiff is on notice that statements are improbable); Fignole v. Curtis Publishing Co., 247 F. Supp. 595, 598 (S.D.N.Y. 1965) ("Thereupon, without any confirmation of the remark of the State Department official, he proceeded to write and publish the article."); Credit Bureau of Dalton, Inc. v. CBS News, supra, 332 F.Supp. at 1298 ("... the allegation of failure to investigate might create a jury issue...."; and Buckley v. Esquire, Inc., supra, 344 F. Supp. at 1135 (S.D.N.Y. 1972) ("Courts have held that actual malice may be inferred from such action by defendant [failure to investigate the truth of the article, when plaintiff protested it was untrue]").*

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* The cases cited by CBS are not in conflict with this approach. In Sullivan, the Court emphasized that the availability of the material was not known to the responsible Times personnel and there were positive reasons for relying upon the information without further investigation. In St. Amant v. Thompson, 390 U.S. 727, 732, n. 3 (1968), the Court cited with approval the discussion of C. J. Warren in the Butts case. Time, Inc. v. Pape, 401 U.S. 279 (1971); Oliver v. Village Voice, Inc., 417 F. Supp. 235 (S.D.N.Y. 1976); and Buchanan v. Associated Press, 398 F. Supp. 1196 (D.D.C. 1975), all involved situations where factors which would point to the need for further investigation were not present. In Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975), the Court stated:

> ...when the story is not "hot news," as is the case here, the investigation must be more thorough, and "actual malice may be inferred when the investigation...was grossly inadequate in the circumstances." Vandenburg v. Newsweek, Inc., [441 F.2d 378, 380 (5th Cir. 1971), cert. denied, 404 U.S. 864 (1971)].

Finally, this Court's decision in Hotchner v. Castillo-Puche, No. 76-7477 (2d Cir. March 23, 1977) is fully congruent with the District Court's opinion. In line with this Court's ruling in Goldwater, Judge Haight found evidence of negligence to be relevant and admissible on the issue of malice (JA 202a-203a). However, he did not hold, as CBS suggests, that mere negligence is actionable (DB 31). Hotchner makes no statement rejecting evidence of negligence as relevant proof. Furthermore, Hotchner merely holds that where the publisher does not have "cause seriously to suspect" the lack of foundation of what is asserted, or "[w]here a passage is incapable of independent verification, and where there are no convincing indicia of unreliability," failures to conduct an elaborate independent investigation may not be actionable (Slip Op. 2528). This holding is consistent with the District Court's analysis of "reckless disregard," even if read with CBS' gloss.

CONCLUSION

From 1964 to the present, the Supreme Court has carefully defined a constitutionally permissible area of libel suits by public officials and public figures. While recognizing the essentiality of a vigorous and robust press, the Court has continually maintained, in the words of Chief

Justice Warren, concurring in Curtis Publishing Co. v. Butts, supra, 388 U.S. at 170, that "[f]reedom of the press under the First Amendment does not include absolute license to destroy lives or careers." The discovery sought by Herbert, and ordered by the District Court, directly involves the central issue of subjective state of mind which lies at the heart of this permissible area of litigation. The District Court's Order threatens no First Amendment rights; rather it derives from a careful consideration of those rights as defined by Sullivan and its progeny. In any event, CBS' contention that the case must be remanded to allow the District Court to reconsider the matter in light of a novel privilege of uncertain bounds is misplaced given the factors analyzed by the Court in reaching its Opinion.* We respectfully urge this Court to affirm the Order of the District Court.

Respectfully submitted,

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Mary K. O'Melveny
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& LUBELL
1370 Avenue of the Americas
New York, New York 10019

Counsel for Plaintiff-Appellee

Dated: June 2, 1977

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* A mere failure of the Court to use the particular words of qualified privilege would not justify a remand when the result is correct whether or not such a privilege applies. Cf. SEC v. Chenery Corp., 318 U.S. 80, 88, (1943); Lum Van v. Esperdy, 321 F.2d 123, 125-26 (2d Cir. 1963).

29 November 1972

MEMORANDUM FOR RECORD

SUBJECT: Request for Information and Support to Barry Lando, CBS-60 Minutes

1. Yesterday Mr Barry Lando, producer for 60-Minutes, visited OCINFO-PI to discuss the type of information and interview support he desired in preparation for a proposed segment for 60-Minutes, tentatively to be aired in January 1973 and concurrently with the release of LTC Herbert, USA-Ret, book Soldier.

2. Lando's stated premise is that Herbert is a liar and he has stated that if he can't develop a sufficient number of incidents in which Herbert's account can not be debunked, then there will be no story. There is no intent to puff Herbert and his book, although it is apparent that any network show, especially a controversial one, will have as a side effect promotion of Herbert's book sales. On balance I believe it is to the best interests of the Army to cooperate selectively, supporting Lando's research and requests on the assumption that the basic premise stated above will not change. Perhaps the premise will change, if so we are not going to come out looking good.

3. In past research dating back to his original query to OASD(PA) on 8 March 1972, Lando has become very familiar with Herbert's stories and many inconsistencies therein. After an interview with members of the OCINFO staff on 13 March, Lando has been gathering data and talking with former associates of Herbert. On 27 June he had a filmed interview with MG Barnes during which the general addressed his relationship with Herbert.

4. At yesterdays meeting Lando asked that he be put in contact with several officers (see attached list) for the purpose of background interviews. No doubt he will asked that one or more of these men consent to a filmed interview at a later date. Lando also asked for factual data on the OPLAN MISSOURI story, Herbert's middle-east experiences, his Cuban experience, and the peace march at Ft Leavenworth.

5. Mr Lando has been advised that his point of contact for all queries related to this project is ASD(PA). Should he contact this office his request will be taken but no response will be given without ASD(PA) approval. Some of the individual in whom he has interest are retired Army . PA assistance will be given to those retired personnel who seek it. This office will contact all of the individuals on the attached list and determine if they desire to talk to Lando. We will set up a schedule for those who agree.

1 Incl

Leonard FB Reed Jr
LTC, GS
Chief, News Branch, DAIO

EXHIBIT I

BEST COPY A

INTERVIEW REPORT | 4 Dec 72

INTERVIEWER AND AFFILIATION:

Barry Lando, CBS-60 Min

INTERVIEWEE AND ORGANIZATION:

Col J Ross Franklin, USACDC

REPORTED BY:

MONITORED BY:

LTC Reed

SUBJECTS COVERED IN INTERVIEW:

1. Relationship with Herbert; reports of war crimes
2. Whereabouts on 14 Feb 69 -- provided 2 personal checks cashed in Hawaii
3. Evaluation of Herbert -- excellent tactical commander who had a continuous propensity to lie and/or exagerate
4. Reason for releif--lost confidence
5. The duck
6. Living conditions within the Bde Hq area
7. Franklin's own career
8. Torture in the MI compound

BRIEF SUMMARY OF INTERVIEW: *(Mandatory for sensitive intelligence subjects. Optional for all others.)*

ol Franklin was extremely candid in his remarks on all subjects, admitting where propiate that he was not up to speed in possibly not having a complete grasp of I that was taking place in the MI compound. Lando persists in contention that he interested in debunking Herbert -- similar to Neil Sheehan's treatment of the nheiter Affair. Lando indicated that he has come to totally disbelieve Herbert. ter the interview he informed me that Mike Wallace has agreed to do the narration d is equally convinced that the story is in debunking Herbert. Lando asserts at he has final decision on the segment and it will not go unless he can convincingly otray Herbert as the bad guy.

EXHIBIT II

VAILABLE

20 December 1972

MEMO FOR THE RECORD

SUBJECT: CBS 60-MINUTES SEGMENT ON LTC HERBERT

Barry Lando, producer of the subject program met with MG Sidle today to discuss his research todate and to request support for the production of the program. Lando indicated that his peice is aimed at debunking Herbert in his long fight against the Army. Further Lando indicated that he would focus some attention on the failure of the media to check out Herbert's story prior to "puffing him up". He plans to focus on four or five events which are contained in Herbert/s book and factually destroy Herbert's credibility.

Lando requested assistance in obtaining filmed interviews with the following:
MG Sidle - discuss the press handling of Herbert and his promotion
Col Franklin- relationship with H. and war crimes allegations
LTC Nicholson- ditto (H) 717 249-2555
Maj Krouch- ditto
SGM Bittorie (Ret) the duck he didn't eat A/C 404/689-2994

Lando requested further assistance on the following subject areas:
off the record access of CID investigation or at least that portion relating Cpt Donavan's testimony
information regarding phone call from Buck Newman to Herbert
name of black Lt mentioned in F ct sheet who didn"t want to go to field
information concerning MACV IG investigation of mistreatment of detainees by 172d MI det in Jun Jul 69
record of Herbert testimony supporting factsheet remark that Herbert stated under oath that he didn't report crimes to MG B rnes
Names of some of those whom Herbert allegedly struck
Confirmation that Herbert was a member of Gemini recovery team in 64
Information of action surrounding withdrawal of Art 15
Request that OCINFO contact following to inform that Lando wants to talk to them on background
Ernesrt Webb- Maj- stationed USMA
Paul H Ray-Maj- stationed SJA School(A/C 703-293-4730)
Stiener-Col-stationed Ft Bragg
Information of the itinerary of War Heroes of Korean era (Search of ... turns nothing)

Gen Sidle indicated we would help as much as is possible within the bounds of propriety and command guidance.

Cy to
HSD(PA) A/v

Leonard FB Reed Jr
LTC, GS

EXHIBIT III

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-7142

ANTHONY HERBERT,

Plaintiff-Appellee,

against

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDOM MIKE WALLACE and CBS INC.,

Defendant-Appellants.

Affidavit of Service By Mail

On Appeal Pursuant to 28 U.S.C. Sec. 1292(b), From An Interlocutory Order Of The United States District Court For The Southern District of New York

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Louis Mark, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 2nd day of June 1977 he served one copy of the attached Brief of Plaintiff-Appellee Anthony Herbert on each of the following named attorneys by enclosing said copies in fully post-paid wrappers addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

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1200 18th Street, N.W.
Washington, D.C. 20036

Louis Mark

Louis Mark

Sworn to before me this
2nd day of June 1977

Quinton C. Van Wynen

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1979

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Brief
IS HEREBY ADMITTED
THIS 2nd DAY OF June 1977

Green & Hellman
Attorney(s) for by MS.

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JUN 2 1977

CAHILL GORDON & REINDEL
Attorneys For: CBS + WALLACE

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